BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

LAWRENCE E. UBEL	)	
Claimant	)	
V.	)	
	)	
STATE OF KANSAS	)	CS-00-0436-071
Respondent	)	AP-00-0445-154
AND	)	
	)	
STATE SELF-INSURANCE FUND	)	
Insurance Carrier	)	

ORDER

Claimant appealed the August 28, 2019, Award (on Remand) entered by Administrative Law Judge Bruce E. Moore. The Board heard oral argument on December 5, 2019.

APPEARANCES

John M. Ostrowski of Topeka, Kansas, appeared for claimant. Nathan D. Burghart of Lawrence, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award (on Remand). At oral argument, the parties agreed the Board could use the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (6th ed.).[1]

ISSUES

Claimant sustained a work-related injury on November 17, 2015. The Kansas Legislature amended the Kansas Workers Compensation Act (KWCA) so that on the date of claimant's accident, the *Guides* (6th ed.) is to be utilized to rate the functional impairment of injured workers. Dr. Stephan L. Pro surgically repaired a torn long head biceps tendon. Drs. Pro and Anne R. Rosenthal rated claimant using both the *Guides* (6th ed.) and the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*

[1] Hereinafter referred to as *Guides* (6th ed.).

(4th ed.).[2] Using a combination of the ratings of Drs. Pro and Rosenthal, Judge Moore found in a January 31, 2019, Award that claimant sustained a 12 percent left upper extremity functional impairment at the level of the shoulder.

In its August 20, 2019, Order, the Board vacated the judge's Award and remanded the matter to him to decide all issues with specific instructions to decide the issue of claimant's impairment using the *Guides* (6th ed.).

Upon remand, Judge Moore determined claimant sustained a 3 percent left upper extremity functional impairment at the level of the shoulder.

Claimant requests the Board modify the Award (on Remand) by awarding him a 16 percent functional impairment. Claimant also raised as an issue whether the holding in *Johnson*[3] should control.

Respondent requests the Board affirm the Award (on Remand).

The issues are:

1. Is the use of the *Guides* (6th ed.) to rate claimant's functional impairment unconstitutional?

2. In addition to his biceps tendon tear, did claimant sustain a left shoulder injury arising out of and in the course of his employment; specifically, was claimant's work accident the prevailing factor causing his left shoulder injury, need for medical treatment and disability?

3. What is the nature and extent of claimant's disability?

4. Is claimant entitled to future medical treatment?

FINDINGS OF FACT

According to claimant, before he was hired by respondent in August 2006, he passed a preemployment physical. Before working for respondent, he suffered a work injury in 2002, had a neck fusion and settled a workers compensation claim. Claimant confirmed he was given impairment ratings for his neck and left shoulder by Dr. P. Brent

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[2] Hereinafter referred to as *Guides* (4th ed.).

[3] *Johnson v. U.S. Food Service*, 56 Kan. App. 2d 232, 427 P.3d 996 (2018), *pet. for rev. granted* (2019).

Koprivica and claimant explained the neck injury caused his shoulder pain. A copy of claimant's settlement hearing transcript and Dr. Koprivica's report were placed into evidence, without objection.

Dr. Koprivica indicated claimant had constant left-sided neck and left shoulder blade pain and had intermittent popping in the left shoulder with use. The doctor concluded claimant suffered work-related neck and left shoulder injuries. Dr. Koprivica indicated claimant had findings of shoulder impingement and some ongoing chronic pain and a mild loss of functional motion. He noted an MRI showed no rotator cuff pathology. Dr. Koprivica did not diagnose or state that claimant had left shoulder arthritis.

Using the *Guides* (4th ed.), Dr. Koprivica opined claimant had a 9 percent left upper extremity impairment at the level of the shoulder for loss of range of motion and a 25 percent whole person impairment for his neck injury. The doctor assigned several restrictions, including avoiding repetitive or sustained activities above shoulder girdle level, limiting overhead lifting to less than 20 pounds and restricting below shoulder girdle level activities to medium physical demand. Claimant did not report his restrictions to respondent when he was hired.

On November 17, 2015, claimant was replacing tires at work using a machine that pneumatically separates the tires from the rims. Claimant used his left arm to try and catch part of the machine that popped out and he immediately felt burning and other sensations in his left shoulder. Claimant was sent to Dr. Pro, who initially treated claimant's left upper extremity and performed surgery in April 2016 to repair a left biceps tendon tear. The judge's findings of fact in the Award (on Remand) detail the medical treatment provided by Dr. Pro and is incorporated herein by reference.

Using page 404, Table 15-5 of the *Guides* (6th ed.), Dr. Pro, on November 21, 2016, opined claimant had a 3 percent left upper extremity impairment. The doctor did not indicate in which class he placed claimant, which grade within the class he placed claimant and whether he considered any modifiers. Dr. Pro indicated claimant had a loss of range of motion. However, the doctor did not rate the loss of range of motion because he felt it was secondary to his preexisting osteoarthritis and because claimant's accident was not the prevailing factor causing the loss of range of motion. Dr. Pro indicated he had none of claimant's medical records prior to seeing him. The doctor opined claimant tore his biceps tendon in the accident at work, which resulted in pain and loss of strength. The doctor testified:

Q. And that biceps tendon tear would result in pain?

A. Yes, sir.

Q. And would it result in loss of strength?

A. Yes, sir. It can.

Q. And would it result in loss of range of motion?

A. It sure can if the pain is such that he's unable to move the shoulder. Both arthritis and biceps issues can both cause loss of range of motion.

Q. Okay. So if he didn't have those issues before, and then almost instantaneously – and I won't use that word because I'm not sure that it's correct – but almost instantaneously he has that onset of symptoms, those would all be consistent with the biceps tendon tear?

A. Not necessarily. Certainly there are a number of patients that have arthritis changes that are asymptomatic until a traumatic event and that then starts the cascade of worsening arthritis symptoms. So I would not make the conclusion that just because he was symptom-free from his arthritis prior to his injury that all of his symptoms are exclusively due to the biceps tear.

Q. Okay. Let's assume that it is, it has something to do with some pre-existing arthritis. It wouldn't solely be attributed to the pre-existing arthritis, would it? The biceps tendon tear would play a role in that?

A. Yes, sir.[4]

. . .

Q. . . . As I understand your testimony, you believe the pain and loss of strength was due to the tear of the biceps tendon?

A. I believe partially due to the strain of the biceps tendon and exacerbation of arthritis.[5]

Dr. Pro's operative report indicated he encountered extensive synovitis, which the doctor indicated is inflammation. The doctor agreed synovitis can be a pain generator that decreases range of motion. Dr. Pro testified claimant had synovitis of the biceps tendon sheath due to his trauma and biceps tear as well as synovitis profusely in his joint attributable to the osteoarthritis.

Dr. Pro opined, "I feel that Mr. Ubel will not likely require any additional treatment regarding his industrial injury. I feel it is more probable than not that he require any

[4] Pro Depo. at 20-21.

[5] *Id.* at 24.

treatment regarding the biceps tendon."[6] The doctor indicated that if claimant needs future medical treatment for his preexisting arthritis, it would be outside his industrial injury.

At the request of his attorney, claimant was evaluated by Dr. Rosenthal, board certified in orthopedic surgery, on April 11, 2017. The doctor's diagnoses were a left shoulder biceps tendon tear with medial subluxation and tearing at the biceps insertion on the superior glenoid; extensive synovitis throughout the shoulder joint; and subacromial bursitis.

Dr. Rosenthal opined claimant's accident was the prevailing factor for his biceps tendon tear, synovitis and subacromial bursitis. She testified claimant's arthritis preexisted his work accident, but his synovitis, caused by his shoulder injury, worsened his arthritis. Dr. Rosenthal attributed claimant's loss of strength to his biceps tendon tear and his global shoulder injury.

According to Dr. Rosenthal, claimant has a significant loss of range of motion due to his biceps tendon tear and shoulder inflammation and some of claimant's loss of range of motion might be due to arthritis. Because claimant said he had full range of motion before his November 2015 injury, Dr. Rosenthal did not attribute any of claimant's loss of range of motion to a 2002 injury that he sustained. Following the 2002 injury, claimant underwent a C5-6 fusion.

Dr. Rosenthal was asked to review the report of Dr. Koprivica, who evaluated claimant in 2005. Dr. Rosenthal testified claimant's right hand grip strength essentially has not changed between Dr. Koprivica's evaluation and her evaluation, but claimant's left hand grip strength decreased 30 percent. Dr. Rosenthal also confirmed claimant did not have normal left shoulder range of motion in 2005. Claimant's active abduction in 2005 was 132 degrees and Dr. Rosenthal indicated normal is 180 degrees. When Dr. Rosenthal measured claimant's abduction, it was 80 degrees. Claimant had 40 degrees of adduction in 2005, which was normal, and Dr. Rosenthal measured 20 degrees. Dr. Koprivica measured flexion at 145 degrees, Dr. Rosenthal measured 120 degrees and normal is 180 degrees. Dr. Koprivica measured internal rotation at 58 degrees and Dr. Rosenthal measured 40 degrees. Dr. Koprivica measured external rotation at 50 degrees, Dr. Rosenthal measured 10 degrees and she indicated 80 degrees is normal. Dr. Rosenthal confirmed that Dr. Koprivica, based on loss of range of motion, assigned claimant a 9 percent impairment for his left shoulder condition.

Using the *Guides* (6th ed.) range of motion impairment section, Dr. Rosenthal believed claimant had a 19 percent left upper extremity impairment for his lost range of motion. The doctor stated:

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[6] *Id.* at 17.

> The diagnosis impairment does not adequately address his significant loss of function; therefore I used Range of Motion Impairment Section 15-7. Based on the Table 15-34 on Page 475, for the shoulder range of motion there is a 3 percent loss of function for the flexion of 120 degrees, 1 percent loss of function for the extension of 30 degrees, 6 percent loss of function for the abduction of 80 degrees, 2 percent loss of function for the adduction of 20 degrees, 4 percent loss of function for the internal rotation of 40 degrees and 2 percent loss of function for the external rotation of 10 degrees. These add up to equal an 18 percent loss of function of the left upper extremity. This is a Grade Modifier 2 according to Table 15-35 on Page 477.
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> Referencing Table 15-7 on Page 406 Functional History Adjustment - Upper Extremity, his symptoms and Quick Dash are consistent with Grade 3.
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> For range of motion, the Range of Motion Grade Modifier in Table 15-35 on page 477 is applied. According to page 474, The Functional History Grade Number is 3 and the range of motion grade modifier is 2, which will increase the total range of motion impairment by 5% according to Table 15-36 on Page 477.
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> The 18 percent loss of function of the left upper extremity is increased by 5 percent which is an additional 1 percent loss of function. This is a **19 percent permanent partial impairment rating of the left upper extremity.** This is completely related to the workman's compensation injury.[7]

Dr. Rosenthal testified that under the *Guides* (6th ed.), one cannot separate out the biceps tendon tear from the loss of motion. However, on cross-examination, the doctor indicated that using the *Guides* (6th ed.), claimant has a 5 percent impairment for his biceps tendon tear. Using the *Guides* (4th ed.), Dr. Rosenthal assigned 16 percent for left shoulder loss of range of motion, 25 percent for his long head biceps tendon tear (using the table for motor loss of the musculocutaneous nerve), and 10 percent for loss of grip strength, which combine for a 43 percent functional impairment to the left upper extremity.

Dr. Rosenthal indicated in her April 2017 report that claimant needed left shoulder replacement surgery now and explained her reasons for recommending the shoulder replacement. At her deposition, the doctor stated claimant will need a left total shoulder arthroplasty in the future and the timing is dependent upon his symptoms.

Dr. Lowry Jones, Jr., evaluated claimant at the judge's request on October 23, 2017. The doctor indicated that the biceps tendon has a long head and a short head and the long head goes on top of the shoulder and attaches to the joint. He testified claimant's biceps tendon was released because it was split and then it was reattached to a hole that is drilled in the bone. The CA ligament was released to remove bone spurs from the bone. The

[7] Rosenthal Depo., Ex. 2.

labrum was addressed by cleaning up and taking out the torn pieces. Dr. Jones testified the surgery performed by Dr. Pro was to fix the torn long head of the biceps and was not intended, in any way, to help with claimant's osteoarthritis.

Dr. Jones opined claimant's left biceps tendon tear occurred at the time of his accident and his advanced osteoarthritis preexisted the accident, but was aggravated by said accident. By aggravation, the doctor meant claimant's previously non-painful arthritis was now painful. The doctor indicated no one knows why an injury such as claimant's will cause the arthritis to become painful. Dr. Jones indicated that Dr. Pro, as the surgeon, would be in the best situation to know the amount of claimant's degeneration.

Dr. Jones was not asked to provide a functional impairment rating for claimant. He testified claimant has lost some range of motion and indicated claimant's loss of range of motion was due to pain, which was triggered by claimant's injury. Dr. Jones indicated that claimant, because of his preexisting osteoarthritis, did not have normal range of motion prior to his surgery and the doctor did not know how much loss of range of motion claimant had following surgery. Dr. Jones stated claimant is a candidate for a shoulder replacement, but that the prevailing factor causing claimant's need for additional medical and/or surgical treatment was his preexisting arthritis, not his work accident. He also recommended that cortisone injections and newer, more experimental injections of stem cells and amniotic fluid be considered.

The judge ruled claimant had a 3 percent left upper extremity functional impairment, stating:

> The court has before it two sets of ratings, each under the 4th and 6th editions of the ***Guides***.
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> Under the 4th edition of the ***Guides***, Dr. Rosenthal's rating of just a biceps tendon rupture would be 25% to the upper extremity. When she factors in lost strength and range of motion, Dr. Rosenthal's rating increases to 38% (43% adjusted by the ***Guides'*** combined values chart to account for Dr. Koprivica's preexisting 9% impairment of function to the left upper extremity). Dr. Pro rated Ubel at a 4% impairment of function to the left shoulder under the 4th edition of the Guides.[8]
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> Under the 6th edition of the ***Guides*****,** Dr. Rosenthal rated Ubel at a 16% impairment of function to the left shoulder, while Dr. Pro rated Ubel at a 3% impairment.

[8] This Award is premised upon the 6th edition of the ***Guides***. The ratings under the 4th edition are referenced to avoid the necessity for a remand if, during the pendency of this appeal, The Kansas Supreme Court strikes down the 6th edition. If the 4th edition is found to be controlling, the court would find that Claimant has suffered a 15% impairment of function to the left upper extremity at the level of the shoulder.

No testifying physician critiqued any of the rating techniques employed, so the court has little to guide it as to weighing those differing opinions. Dr. Rosenthal only saw Ubel one time, and did not review his radiologic studies. She was retained expressly for litigation. In contrast, Dr. Pro provided the entire course of Ubel's treatment and recovery, including viewing the interior of the shoulder and its structures during the arthroscopic surgery.

Dr. Rosenthal relied on Ubel's belief that he had no prior loss of strength or range of motion. She discounted Dr. Koprivica's opinions but, in light of his measurement of decreased range of motion 10 years prior, Dr. Rosenthal's premise that all of Ubel's range of motion deficits (and her impairment rating) are attributable to the work accident is undermined and rendered unreliable.

Dr. Pro supervised Ubel's treatment and recovery and, in the court's view, is in a better position to assess Ubel's current function and the impact of the work injury on that level of function. The court will give greater weight to Dr. Pro's opinions.

Giving consideration to all of the evidence presented, the court adopts Dr. Pro's rating opinion and finds and determines that **Ubel has suffered a 3% impairment of function to the left upper extremity at the level of the shoulder.**[9]

The judge denied future medical treatment, stating:

There is no evidence before the court that Ubel will require any future medical treatment for the injury to the biceps tendon. The greater weight of the evidence before the court is that any future medical care will be attributable to the preexisting and progressing osteoarthritis. The opinions of Drs. Pro and Jones establish that the prevailing factor for any future medical care will be the preexisting and progressing osteoarthritis, not the work injury.[10]

PRINCIPLES OF LAW AND ANALYSIS

1. The Board does not have jurisdiction to consider whether use of the *Guides* (6th ed.) is unconstitutional.

K.S.A. 2015 Supp. 44-510d(b)(23) states:

> Loss of or loss of use of a scheduled member shall be based upon permanent impairment of function to the scheduled member as determined using the fourth edition of the American medical association guides to the evaluation of

[9] Judge's Award (on Remand) at 8-9.

[10] *Id.* at 9-10.

> permanent impairment, if the impairment is contained therein, until January 1, 2015, but for injuries occurring on or after January 1, 2015, shall be determined by using the sixth edition of the American medical association guides to the evaluation of permanent impairment, if the impairment is contained therein.

Like the judge, the Board is aware that in *Johnson*,[11] the Kansas Court of Appeals found the *Guides* (6th ed.) unconstitutional. The Kansas Supreme Court has agreed to review *Johnson*. Under Kansas Supreme Court Rule 8.03, the Court of Appeals decision has no force or effect pending Kansas Supreme Court review. Until *Johnson* is final, use of the *Guides* (6th ed.) to rate workers injured on or after January 1, 2015, is still the law in Kansas. The Board has no authority to determine if K.S.A. 2015 Supp. 44-510d(b)(23) is unconstitutional.

2. Claimant's left shoulder injury arose out of and in the course of his employment.

K.S.A. 2015 Supp. 44-508, in part, states:

> (d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.
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> . . .
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> (f)(1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.
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> (2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.
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> . . .
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> (B) An injury by accident shall be deemed to arise out of employment only if:

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[11] *Johnson v. U.S. Food Service*, 56 Kan. App. 2d 232, 427 P.3d 996 (2018), *pet. for rev. granted* (2019).

> (i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and
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> (ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

Respondent asserts the overwhelming medical evidence is that claimant's accident was the prevailing factor causing his biceps tendon tear, but not his preexisting arthritis. Respondent asserts claimant's injury, need for medical care and disability or impairment be limited to the biceps tendon tear. Claimant asserts his left shoulder was not painful until after the accident, his left shoulder range of motion has decreased, he now has synovitis in the shoulder joint and this case is similar to *Le*.[12]

Under *Le*, claimant must prove his injury is more than a sole aggravation, acceleration or exacerbation of a preexisting condition or rendered a preexisting condition symptomatic. In addition, claimant must prove his injury by accident arose out of his employment. Doing so requires he prove his accident was the prevailing factor in causing his injury, medical condition and resulting disability.

In *Le*, two of three physicians indicated Ms. Le's pain and disability were due to her work accident and not her preexisting osteoporosis. The Court of Appeals indicated the Board erred in concluding the remaining physician's contrary opinion was substantial evidence to support a finding Ms. Le's ongoing pain that kept her from working was due to her osteoporosis and not her accidental work injury. *Le* does not stand for the proposition that her employer was responsible for treating her preexisting osteoporosis, only for treating her chronic pain which was the sequela of her accidental work injury. *Le* also does not stand for the proposition that once there is more than solely an aggravation, acceleration or exacerbation of a preexisting condition or rendering symptomatic a preexisting condition, the employer is responsible for all recommended medical treatment.

Here, there is more than solely an aggravation, acceleration or exacerbation of claimant's preexisting left shoulder arthritis. Claimant sustained additional loss of range of motion and loss of strength. Dr. Pro indicated that claimant's pain and loss of strength was due to both his biceps tendon tear and exacerbation of his arthritis. Claimant lost a significant amount of range of motion between 2005, when it was measured by Dr. Koprivica, and 2017, when measured by Dr. Rosenthal. Also significant is the fact that Dr. Koprivica did not diagnose claimant with left shoulder arthritis in 2005. Dr. Jones noted claimant's preexisting non-painful arthritis was now painful and claimant had some loss of range of motion as a result of his accident. In summary, the Board finds claimant sustained

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[12] *Le v. Armour Eckrich Meats*, 52 Kan. App. 2d 189, 364 P.3d 571, *rev. denied* 301 Kan. 1046 (2015).

a left shoulder injury arising out of and in the course of his employment and his accident was the prevailing factor causing his biceps tendon tear and left shoulder injury.

3. Claimant sustained an 11 percent left upper extremity functional impairment at the level of the shoulder.

One of claimant's arguments is that Judge Moore, in his January 31, 2019, Award, averaged the ratings of Drs. Pro and Rosenthal, but in his August 28, 2019, Award (on Remand), completely disregarded Dr. Rosenthal's opinions. The Board finds the judge's change in rationale rather unusual.

Respondent asserts that prior to his accident, claimant's range of motion was already limited because of his preexisting arthritis and points to Dr. Koprivica's 2005 range of motion measurements in support of this premise. However, Dr. Rosenthal's measurements showed that claimant's range of motion decreased significantly since he was evaluated by Dr. Koprivica in 2005. Claimant's abduction decreased from 132 to 80 degrees (39 percent), adduction decreased from 40 to 20 degrees (50 percent), flexion decreased from 145 to 120 degrees (17 percent), internal rotation decreased from 58 to 40 degrees (31 percent) and external rotation decreased from 50 to 10 degrees (80 percent).

Determining claimant's left shoulder loss of range of motion after his current injury is a daunting task. *Tovar*[13] allows a judge and the Board to weigh the evidence and make its own conclusions as to an injured worker's functional impairment. The Board is cognizant that Dr. Koprivica previously assigned claimant a 9 percent left shoulder functional impairment using the *Guides* (4th ed.). Dr. Rosenthal assigned claimant a 19 percent left upper extremity functional impairment rating using the *Guides* (6th ed.). She indicated 5 percent could be separated out for his biceps tendon tear and the remaining 14 percent for his left shoulder. As previously noted, Dr. Jones indicated claimant sustained some loss of range of motion as a result of his work accident.

The Board cannot subtract Dr. Koprivica's 9 percent rating. The KWCA does not allow the Board to use the *Guides* (4th ed.) to rate an injured worker with claimant's date of accident. Subtracting Dr. Koprivica's *Guides* (4th ed.) 9 percent rating from Dr. Rosenthal's *Guides* (4th ed.) or *Guides* (6th ed.) rating does not comply with the KWCA. It would also be like comparing apples and oranges.

The Board chooses to give equal weight to the ratings of Drs. Pro and Rosenthal and, therefore, finds claimant has an 11 percent functional impairment of the left upper extremity under the *Guides* (6th ed.).

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[13] *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

4. Claimant is not entitled to future medical treatment.

K.S.A. 2015 Supp. 44-510h(e) states:

> It is presumed that the employer's obligation to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, apparatus and transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the director, in the director's discretion, so orders, including transportation expenses computed in accordance with subsection (a) of K.S.A. 44-515, and amendments thereto, shall terminate upon the employee reaching maximum medical improvement. Such presumption may be overcome with medical evidence that it is more probably true than not that additional medical treatment will be necessary after such time as the employee reaches maximum medical improvement. The term "medical treatment" as used in this subsection (e) means only that treatment provided or prescribed by a licensed health care provider and shall not include home exercise programs or over-the-counter medications.

The Board finds the future medical opinions of Drs. Pro and Jones more persuasive than the opinion of Dr. Rosenthal and, therefore, denies claimant future medical benefits. Drs. Pro and Jones agree that any future medical treatment claimant requires is for his preexisting left shoulder arthritis and not for the biceps tendon tear he sustained as a result of his work accident. As noted above, *Le* does not stand for the proposition that once there is more than solely an aggravation, acceleration or exacerbation of a preexisting condition or rendering symptomatic a preexisting condition, the employer is responsible for all recommended medical treatment.

As required by the Workers Compensation Act, all members of the Board have considered the evidence and issues presented in this appeal.[14] Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the Board modifies the August 28, 2019, Award (on Remand) entered by Judge Moore by finding claimant sustained a left biceps tendon tear and a left shoulder injury that arose out of and in the course of his employment and sustained an 11 percent left upper extremity functional impairment. Claimant is entitled to receive 43.71 weeks of temporary total disability benefits at the rate of $496.93 per week, or $21,720.81, followed by 19.94 weeks of permanent partial disability benefits at the rate of $496.93 per

[14] K.S.A. 2018 Supp. 44-555c(j).

week, or $9,908.78, for an 11 percent left upper extremity functional impairment at the level of the shoulder, making a total award of $31,629.59, which is all due and owing, less any amounts previously paid.

The judge's ruling that claimant is not entitled to future medical treatment is affirmed.

The Board adopts the remaining orders set forth in the August 28, 2019, Award (on Remand) to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of February, 2020.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: John M. Ostrowski, Attorney for Claimant (via OSCAR)

Nathan D. Burghart, Attorney for Respondent and its Insurance Carrier (via OSCAR)

Honorable Bruce E. Moore, Administrative Law Judge